No. 796

In the Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL–CIO, AND ITS LOCAL 22

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

CITATIONS

293-063—68——1

Cases—Continued

Cases—Continued

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OPINIONS BELOW

The opinion of the court of appeals (R. 33–40) is reported at 379 F. 2d 702. The decision and order of the National Labor Relations Board (R. 14–25) are reported at 159 NLRB 1065.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1967 (R. 41). On September 19, 1967, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to, and including, November 6, 1967, and the petition for a writ of certiorari was filed on that date, and was granted on

January 15, 1968 (R. 42). The jurisdiction of the Court rests on 28 U.S.C. 1254(1), and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 522, 29 U.S.C. 411, *et seq.*) are set forth in the Appendix, *infra*, pp. 39–42.

QUESTION PRESENTED

Whether a union commits an unfair labor practice, in violation of Section 8(b)(1)(A) of the National Labor Relations Act, by disciplining a member for filing a charge against the union with the National Labor Relations Board before he had exhausted all internal union procedures for the resolution of his dispute.[1]

STATEMENT

Edwin D. Holder, a member of Local 22 and its International Union, the Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, was employed by the United States Lines Company. Local 22 was the collective bargaining representative of the unit in which he worked. (R. 16; 3, 5.) The International Union's constitution, which was binding on Local 22, provided (R. 6):

[1] A subsidiary question is whether the charge filed by the member in this case adequately alleged that the union had violated his Section 7 rights (*infra*, pp. 17–18).

> Every member * * * considering himself * * * aggrieved by any action of this Union, the [General Executive Board], a National Officer, a Local or other subdivision of this Union shall exhaust all remedies and appeals within the Union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union.

Prior to February 28, 1964, Holder submitted charges to Local 22 accusing its president of violating the International's constitution, but the Local decided that its president had not committed the alleged violations. (R. 16–17, 5.) Without pursuing the intra-union appeals procedure,[2] Holder, on February 28, filed with the Board an unfair labor practice charge based on the same facts as his earlier charges filed with the Union. He alleged that the Local had violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act "by causing U.S. Lines to discriminate against him because he had engaged in certain protected activity with respect to his employment by U.S. Lines" (R. 16; 3, 5, 28).[3]

[2] The International's constitution provided, *inter alia*, for appeals to the General Membership, to the General Executive Board, and to the next National Convention (R. 6).

[3] Holder filed a companion charge with the Board against the Company, alleging that it had violated Section 8(a) (3) and (1) of the Act by discriminating against him in the assignment and distribution of work because of his union activities (R. 27). Holder's charges were predicated, *inter alia*, on his contention that Local 22 and the Company had caused him to be demoted, with a consequent loss of seniority and work, because of his intra-union opposition to the president of Local 22, and that Local 22 had thereafter unlawfully refused to process his grievance relating to the demotion. Fol-

Not long thereafter, Local 22 notified Holder that intra-union charges had been lodged against him alleging that he had violated the Unions' by-laws and constitution by filing the unfair labor practice charge with the Board before he had exhausted his internal remedies. After a hearing before a trial board of the Local, Holder was found guilty of the violations alleged and expelled from the Local and the International. Upon Holder's appeal, the General Executive Board of the International affirmed the Local's action. (R. 17; 3–4, 5.) Holder then filed the instant unfair labor practice charge with the Board alleging that the Unions had violated Section 8(b)(1)(A) of the Act by expelling him for filing the earlier charge, and a complaint issued (R. 26, 2–5).

The Board found that Local 22 and the International violated Section 8(b)(1)(A) of the Act by expelling Holder for filing a charge with the Board without first having exhausted his intra-union procedures (R. 24–25, 14–23a). The Board noted that in *Local 138, Int'l Union of Operating Engineers (Charles S. Skura)*, 148 NLRB 679, it had held "that the Act confers upon any person the right to file an unfair labor practice charge, that a fine is by nature coercive, and, hence, the union's imposition of [a] fine against [a member] for filing a charge with the Board was violative of his statutory rights" (R. 18). The Board concluded that this principle was applicable here, since, if " 'a fine is by nature coercive,' an

lowing investigation, the Board's Regional Office declined to issue a complaint on the charges, on the ground that they were untimely and lacking in evidentiary support (R. 29–32).

expulsion from membership even more effectively coerces employees" (R. 21). The Board ordered the Unions to cease and desist from expelling members for filing charges with the Board, and to reinstate Holder to membership without any loss of status (R. 22–23a, 24–25).

The court of appeals set aside the Board's order (R. 33–40). The court read Section 8(b)(1)(A) as protecting a union member's right to file unfair labor practice charges against his union only if the charges themselves assert misconduct which, if proved, would constitute a deprivation of rights protected by Section 7 (R. 36–37). The court suggested that Holder's charge was inadequate by that standard, but determined not to remand the case to the Board for consideration of whether Section 7 rights were sufficiently involved because of what it found to be other errors requiring that the Board's order be set aside (R. 38).

The court held that the proviso to Section 8(b)(1)(A) of the Act, which preserves "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein," "protects the union's action in this case" (R. 38). Although recognizing that "the proviso does not enable a union to promulgate any rule it desires," the court concluded that, since the "rule in question required only that the union be given a fair opportunity to correct its own wrong before the injured member should have recourse to the Board," it did not "offend public policy or impede the normal and proper administration of the Act" (*ibid.*). The court

further found that the proviso to Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959—which prohibits a labor organization from limiting the right of any member to initiate any judicial or administrative proceeding but provides that a member may be required first to exhaust reasonable hearing procedures not exceeding four months—"expressly sanctions" the use of union discipline designed to require pursuit of internal remedies (R. 40).

SUMMARY OF ARGUMENT

I

Only when a charge has been filed with the National Labor Relations Board may the Board exercise its unfair labor practice jurisdiction. For this reason, this Court has recently noted that "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 238. In addition to Section 8(a)(4) of the National Labor Relations Act which explicitly makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges under the Act, the general prohibition in Section 8(a)(1) against coercion of "employees in the exercise of the rights guaranteed in Section 7" also prohibits employer retaliation because an employee has resorted to Board processes. For a union to discipline an employee-member for filing charges with the Board without first exhausting intra-union procedures tends to

restrain or coerce him in the exercise and protection of his Section 7 rights by filing charges with the Board as promptly as he considers necessary. Hence, the Board has properly concluded that such union discipline violates Section 8(b)(1)(A) of the Act, which makes it an unfair labor practice for a labor organization "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7."

II

This Court has held that Section 8(b)(1)(A) does not bar a union from disciplining strikebreakers, because in adding that paragraph Congress did not intend to regulate the internal affairs of unions. A proviso to Section 8(b)(1)(A) specifically states that the paragraph "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *." The instant case, however, is materially different from that to which the proviso is addressed. A union rule requiring exhaustion of union procedures before invoking the Board's processes extends beyond the area of legitimate internal union affairs and impinges upon the channels created by Congress for the administration of a public law and policy.

Thus, although union constitutions frequently contain provisions which require a member, under pain of discipline, to exhaust internal union procedures before resorting to a court or other outside tribunal, it has generally been recognized that such restrictions are against public policy. (Such a rule is to be distinguished from the principle that a court may choose not

to entertain a member's action against a labor organization until he has exhausted all adequate remedies within the organization; the latter is a rule of judicial administration.) Moreover, to permit a union to discipline a member for filing charges with the Board without exhausting intra-union procedures would impair the effective administration of the Act. For it would require the member who believes that a union official has committed an unfair labor practice either to pursue a private remedy which affords little promise of providing a full and complete remedy for the wrong committed, or to risk a union penalty should Board processes be invoked without such exhaustion and the Board ultimately find that the member's charge is without merit.

III

Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 does not require a different conclusion. The opening portion of that section—"No labor organization shall limit the right of any member thereof to institute an action in any court, or in any proceeding before any administrative agency"—shows that the main thrust of the section is to prohibit those limitations by unions which the courts had previously declared to be contrary to public policy, such as a limitation on the right to sue. The proviso to Section 101(a)(4)—stating that "any * * * member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or other administrative proceed-

ings"—does not warrant upholding union discipline in cases such as this. Construing this proviso in accordance with the substantive policy of the section, and in light of its legislative history, the proviso does not authorize the union, as the court below held, to discipline a member who has not exhausted intra-union procedures for at least four months. The proviso is only a direction to the courts or other agencies that they may not remit a member to such procedures for a longer period and, in any event, may require resort to internal remedies only if, in their judgment, there is a reasonable likelihood that those procedures would provide an adequate remedy for the wrong complained of.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT A UNION VIOLATES SECTION 8(b)(1)(A) OF THE NATIONAL LABOR RELATIONS ACT BY DISCIPLINING A MEMBER BECAUSE HE FILED CHARGES WITH THE BOARD WITHOUT FIRST HAVING EXHAUSTED HIS INTERNAL UNION REMEDIES

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7." The question presented is whether in light of the history of that provision and its proviso that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *", a union violates Section 8(b)(1)(A) where it expels a member (who is also an employee) for filing charges with the Board without first exhausting internal union procedures. The Board has reasonably

determined that the effective administration of the Act demands that employees have an unfettered right to bring their grievances to the attention of the Board as promptly as they consider necessary; that Section 8(b)(A)(1) of the Act prohibits employer interference with the right to file charges with the Board; and that similar considerations warrant interpreting Section 8(b)(1)(A) as barring corresponding union interference with that right by the threat of discipline for exercising it without first having exhausted internal union procedures Neither the recent decision in *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, nor the proviso to Section 8(b)(1)(A), nor Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act (*infra*, p. 42) warrants a contrary conclusion.

A. THE EFFECTIVE ADMINISTRATION OF THE ACT IS DEPENDENT UPON FULL FREEDOM TO FILE CHARGES WITH THE BOARD; TO INTERPRET SECTION 8(b)(1)(A) AS PERMITTING UNION DISCIPLINE FOR PROMPT FILING OF A CHARGE WITH THE BOARD UNDULY ERODES THIS FREEDOM AND CONFLICTS WITH OTHER POLICIES AND PROVISIONS OF THE ACT

1. Section 7 of the Act gives employees the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and also the right "to refrain from any or all such activities." Section 8 makes certain conduct by employers and labor organizations which abridges these rights unfair labor practices, and Section 10(a) empowers the Board "to

prevent any person from engaging in any [such] unfair labor practice." The Board, however, cannot initiate its own proceedings;[5] Section 10(b) provides that it can act only "[w]henever *it is charged* that any person has engaged in or is engaging in any * * * unfair labor practice." (Emphasis added). As this Court recently noted, "[i]mplementation of the Act is dependent upon the initiative of individual persons who must * * * invoke its sanctions through filing an unfair labor practice charge." *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 238.[6]

Because only the filing of a charge can trigger the Board's processes, "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board" (*ibid.*). Section 8(a)(4) explicitly makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges under the Act.[7]

[5] See *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 236, citing the Board's decision in *Skura*, *supra*, p. 4.

[6] See, also, *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18; *Hercules Powder Co.* v. *National Labor Relations Board*, 297 F. 2d 424, 433 (C.A. 5); *National Labor Relations Board* v. *Local 450, Int'l. Union of Operating Engineers*, 281 F. 2d 313, 317, n. 4 (C.A. 5), certiorari denied, 366 U.S. 909; *Building Material Teamsters, Local 282* v. *National Labor Relations Board*, 275 F. 2d 909, 913 (C.A. 2).

[7] See *John Hancock Mutual Life Insurance Co.* v. *National Labor Relations Board*, 191 F. 2d 483, 485–486 (C.A. D.C.); *National Labor Relations Board* v. *Lamar Creamery Co.*, 246 F. 2d 8, 9–10 (C.A. 5); *National Labor Relations Board* v. *Syracuse Stamping Co.*, 208 F. 2d 77, 80 (C.A. 2).

But in addition, since the filing of charges with the Board is essential to the enforcement of the other rights specified in Section 7, it has long been recognized that an employer's interference with an employee's resort to Board processes may also constitute a violation of "'the general prohibition in' Section 8(a)(1) against coercion of 'employees in the exercise of the rights guaranteed in section 7.'" *Vogue Lingerie, Inc.* v. *National Labor Relations Board,* 280 F. 2d 224, 226 (C.A. 3).[8]

What has been said about employer intimidation must apply with equal force to union interference with protected activities: "What would be the value of the detailed rights given in § 7 if employees were afraid to assert them?" *National Labor Relations Board* v. *Whitfield Pickle Co.,* 374 F. 2d 576, 583 (C.A. 5). One of the express congressional objectives in adding Section 8(b)(1)(A) to the Act in 1947, making it an unfair labor practice for a union to restrain or coerce employees in the exercise of Section 7 rights, was to impose upon union conduct restric-

[8] See, also, *Gibbs Corp.*, 131 NLRB 955, 963, enforced, 308 F. 2d 247 (C.A. 5); *Pacific Intermountain Express Co.*, 110 NLRB 96, 108–109, enforced, 228 F. 2d 170 (C.A. 8), certiorari denied, 351 U.S. 952.

Similarly, it has been held that an employer violates Section 8(a)(1) of the Act by encouraging or inducing employees to withdraw charges filed with the Board, *Clearfield Cheese Co.*, 106 NLRB 417, 418, enforced, 213 F. 2d 70 (C.A. 3); by deterring employees from testifying truthfully in Board proceedings, *Jackson Tile Manufacturing Co.*, 122 NLRB 764, 766, enforced, 272 F. 2d 181 (C.A. 5); or by demanding, in advance of trial, copies of statements which employees had given to Board investigators, *Texas Industries, Inc.*, 139 NLRB 365, 367–368, enforced, 336 F. 2d 128, 132–133 (C.A. 5).

tions comparable to those Section 8(a) imposes on employers.[9] In *International Ladies' Garment Workers' Union* v. *National Labor Relations Board,* 366 U.S. 731, 738, this Court noted the legislative design to seek relative parity between employers and unions in their conduct toward employee-members, and concluded that "[i]t was the intent of Congress [in adding Section 8(b)(1)(A)] to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights."

The fact that Congress originally provided a specific bar against *employer* interference with the right to file charges with the Board (Section 8(a)(4), *infra,* p. 39) but did not later specifically outlaw *union* interference does not militate against finding such a bar in the general terms of Section 8(b)(1)(A). "Section 8(a)(4), and its predecessor in like terms in the original Wagner Act of 1935 only made clear that which was implicit in original Section 8(1)," which, like Section 8(b)(1)(A), broadly prohibits restraint of employees in the exercise of their Section 7 rights. *Roberts* v. *National Labor Relations Board,* 350 F. 2d 427, 428 (C.A.D.C.).

In light of this Court's oft-repeated caveat that, in appraising the delicate task ofdrafting labor legislation, attention must focus on the overall plan rather than merely on the literal terms that resulted, *e.g., National Labor Relations Board* v. *Allis-Chalmers*

[9] See, *e.g.*, 93 Cong. Rec. 4021, 2 *Leg. Hist. LMRA, 1947,* p. 1025 (remarks of Sen. Taft); 93 Cong. Rec. 4016, 2 *Leg. Hist. LMRA, 1947,* p. 1018 (remarks of Sen. Ball).

Mfg. Co., 388 U.S. 175, 179–180, the court below attributed too much significance (R. 37) to the deletion in conference of a paragraph that would have explicitly reached the union conduct here involved by making it an unfair labor practice for a union:

> to fine or discriminate against any member, or to subject him to any * * * penalty, on account of his having criticized, complained of, or made charges or instituted proceedings against, the organization or any of its officers, or on account * * * of his having supported or failed to support any proposition submitted to the labor organization, or to citizens generally, for a vote. [Sec. 8(c)(5) of the Hartley bill, H.R. 3020, 80th Cong., 1st Sess., 1 *Leg Hist. LMRA*, 1947, p. 180.]

As the court noted in *Roberts, supra,* this provision would have been so much broader than a mere prohibition against union discipline for filing charges that its deletion throws little light on Congress's view of that particular practice. Moreover, as the court added, "the legislators may have decided it was unnecessary to make specific that it might be an unfair labor practice under Section 8(b)(1) to fine or discriminate against a member for filing a charge against a union." 350 F. 2d at 428, n. 1.

2. Earlier this Term this Court held in *Nash, supra,* that the structure and objectives of the National Labor Relations Act must preclude the States from taking "coercive actions which the Act forbids employers and unions to take against persons making

charges * * *". [10] The Court explained that employers and unions alike are forbidden by the Act to engage in coercive activities which have "a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board." [11]

The Board has long followed this approach. In other cases it has held that a union restrains and coerces, in violation of Section 8(b)(1)(A) of the Act, when it threatens an employee with physical violence or job loss because he has filed charges with the Board or has decided to give testimony in a Board proceeding.[12] The instant case is merely another application of this statutory policy. The general test of when Section 8(b)(1)(A) is violated is whether the misconduct may reasonably tend to intimidate employees in the exercise of rights protected by the Act. *Local 542, International Union of Operating Engineers* v. *National*

[10] In *Nash*, 389 U.S. at 239, the Court held that Florida's policy of denying unemployment compensation to employees who filed unfair labor practice charges against their employer restrained employees in the exercise of their right to file charges with the Board, and hence was in conflict with, and thus barred, by the Act.

[11] 389 U.S. at 239. In the course of the discussion of this point, the Court specifically cited the decision in *Roberts* v. *National Labor Relations Board*, 350 F. 2d 427 (C.A.D.C.), discussed, *supra*, pp. 13–14, in which the District of Columbia Circuit sustained the Board's treatment of *Skura*-type cases.

[12] See *Textile Workers Union of America*, 108 NLRB 743, 749, enforced in relevant part, 227 F. 2d 409, 411 (C.A.D.C.); *Int'l Ass'n of Bridge Workers, Local 84*, 112 NLRB 1059, 1060; *Bordas & Co.*, 125 NLRB 1335, 1336, enforced, 288 F. 2d 132 (C.A.D.C.); *Local 450, Operating Engineers*, 122 NLRB 564, 568, enforced, 281 F. 2d 313, 317 (C.A. 5), certiorari denied, 366 U.S. 909.

Labor Relations Board, 328 F. 2d 850, 852–853 (C.A. 3). For a union to fine or expel a member for filing charges with the Board tends to restrain or coerce him and others like him in the exercise of their rights no less than those other forms of reprisal. As the Board pointed out in *Skura, supra*, 148 NLRB at 682, there "can be no doubt that a fine is by nature coercive, and that the imposition of a fine by a labor organization upon a member who files charges with the Board does restrain and coerce that member in the exercise of his right to file charges." Similarly, expulsion from the union would tend to have the same effect, since it entails loss of union strike fund, pension, and insurance benefits; loss of a voice in the decisions made by the collective bargaining representative; and various social pressures. See *Cannery Workers Union (Van Camp Sea Food Co.)*, 159 NLRB 843, 846.

3. Nor does the Act sanction coercive union discipline where, as here, the union's rule purports to postpone rather than completely prevent resort to the Board. Nothing in the Act requires an employee to exhaust internal union remedies before filing a charge with the Board.[13] In *Skura*, the Board concluded that, because of the overriding public interest involved,

[13] On the contrary, Section 10(a) of the Act provides that the Board's power to remedy unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Only recently, this Court specifically recognized "that the National Labor Relations Act does not require prior exhaustion of internal union remedies." *Wirtz* v. *Local 125, Laborers' International Union*, No. 58, O.T. 1967, decided January 15, 1968.

no private organization like a labor union should be recognized as having the authority to regulate access to the Board in this way.[14] Hence, to permit an employee-member to be exposed to union discipline if he does not exhaust the union's remedies impermissibly tends to coerce him to forego his statutory right to invoke Board processes as promptly as he considers necessary.

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4. A subsidiary issue is presented by the holding of the court below that the original charges filed by Holder did not adequately allege that Local 22 had interfered with the exercise of rights guaranteed by Section 7 (R. 35–36). First, we question whether this inquiry was even relevant. The approach taken by the court below would make protection for resort to the Board turn on such imponderables as whether the General Counsel decided to pursue the charge or whether a court might later say the charge was drafted with sufficient artistry. The right of access to the Board is "too precious a right to be curbed by the risky prediction" that the charge adequately invokes Section 7 rights. Cf. *Ryan* v. *International Brotherhood of Electrical Workers,* 361 F. 2d 942, 944 (C.A. 7). It seems far more in keeping with sound public policy to accord protection to the union member "as long as his [charge] is brought honestly and in good faith." Summers, *Legal Limitations on Union Discipline,* 64 Harv. L. Rev. 1049, 1068 (1951); see, also, note 19, *infra,* and accompanying text.

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[14] The policy of the Act is to promote promptness in filing charges, since it forbids issuance of a complaint based on conduct occurring more than six months earlier. Section 10(b), 29 U.S.C. 160(b).

Assuming *arguendo* the validity of the court's view that the recital in the charge of a deprivation of Section 7 rights is a relevant factor in determining whether the Unions' subsequent expulsion of Holder for filing the charge constituted an unfair labor practice, the court nonetheless erred in concluding that the charge was inadequate. The record before the court showed that Holder alleged in his charge that Local 22 "had violated Section 8(b)(1)(A) and (2) of the Act by causing U.S. Lines to discriminate against him because he had engaged in certain protected activity with respect to his employment by U.S. Lines" (R. 3, 5). The references to "protected activity" and Section 8(b)(1)(A) make it apparent that an impairment of Section 7 rights was alleged. Moreover, the charge itself specifically recited that the Local "[b]y these and other acts," had restrained and coerced employees (R. 28). No greater specificity was required. "The charge is not proof. It merely sets in motion the machinery of an inquiry. * * * The charge does not even serve the purpose of a pleading." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18. Thus, for the purpose of instigating an investigation into whether Section 7 rights had been violated, the charge was more than adequate.

B. UNION DISCIPLINE FOR FILING CHARGES WITH THE BOARD WITHOUT FIRST EXHAUSTING INTERNAL UNION PROCEDURES IS NOT PRIVILEGED AS AN INTERNAL UNION MATTER BEYOND THE SCOPE OF SECTION 8(b)(1)(A)

In *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, this Court sustained the Board's analysis that Section 8(b)(1)(A)

of the Act does not prevent a union from imposing fines on members who cross a union picket line designed to implement an authorized strike. The Court noted that the "economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent * * *'" (*id.* at 181). The Court further found that a limitation on the union's right to discipline strikebreakers would be inconsistent with "the repeated refrain throughout the debates on § 8(b)(1)(A) and other sections that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status" (*id.* at 195). But, as *Allis-Chalmers* itself warns (*id.* at 178–179), excessive literalism is incompatible with sound administration of the labor relations statutes. For this reason the Board, as the agency primarily charged with applying these policies in concrete factual situations, has been "discriminating"[15] rather than mechanical in applying Section 8(b)(1)(A) and its proviso. The Board has properly and reasonably determined that union discipline for filing a charge with the Board without exhausting intra-union procedures is not justified by any of the considerations underlying the *Allis-Chalmers* decision.

A union rule requiring exhaustion of union pro-

[15] *Price* v. *National Labor Relations Board*, 373 F. 2d 443, 446 (C.A. 9), pending on petition for certiorari, No. 339, this Term.

cedures extends beyond the area of legitimate internal union affairs which both the legislative history of the Taft-Hartley amendments [16] and the terms of the proviso in Section 8(b)(1)(A) (pp. 9, 39–40, *infra*) indicate Congress intended to leave largely free from governmental regulation. Although requirements that a union member exhaust internal union procedures before resorting to a court or other outside tribunal are not uncommon,[17] this phenomenon does not establish their lawfulness. As Archibald Cox has pointed out:[18]

> This restriction is against public policy. No private organization should be permitted to restrict any person's access to courts of justice. The right should be as absolute as the right to appear in court as a witness, to petition on a legislature, or to communicate with a member of Congress.[19]

Another frequent commentator on these questions, Professor Clyde Summers, has explained:[20]

> * * * Labor's traditional distrust of the judiciary has caused many unions to prohibit mem-

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[16] The history is summarized in *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.*, *supra*, 388 U.S. at 184–192.

[17] *Disciplinary Powers and Procedures in Union Constitutions*, Bulletin No. 1350, U.S. Dept. of Labor, Bureau of Labor Statistics (1963), pp. 18–19, 32–33.

[18] Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 839 (1960).

[19] See, also, *In re Quarles*, 158 U.S. 532; *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 69 ("the courts cannot tolerate the expulsion of a member of a union * * * merely because he invokes the process of the courts to protect his rights—even if he does so mistakenly.") (Jackson, J., dissenting).

[20] Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1067–1068 (1951).

> bers from resorting to the courts until all appeals within the union have been exhausted. In a number of cases, members have been expelled for attempting to enjoin union officers from such predatory practices as selling jobs, demanding kick-backs, destroying resistant locals, and embezzling union funds. The courts have reciprocated by looking with a jaundiced eye upon all discipline which restricts the member's freedom to use the judicial process and, in these flagrant cases, have freely protected the individual member from discipline. Even in more doubtful cases * * *, the courts have also given full protection.
>
> Legal relief in these cases is based upon preserving free access to the courts and is, therefore, not limited to those suits in which a member has a good cause of action. He will be protected as long as his suit is brought honestly and in good faith * * *. [Footnotes omitted.][21]

In *Skura, supra,* 148 N.L.R.B., at 682–683, the Board took this same position and concluded that "the overriding public interest" in unimpeded access

[21] It is important at this juncture to note a distinction which has particular relevance for and is more fully discussed in connection with the final point in this argument, pp. 28–37, *infra.* Significantly different from a union rule against resort to the courts or other outside tribunals without exhausting internal union remedies is "the judicial doctrine that a court will not entertain a member's action against a labor organization until he has exhausted all adequate remedies within the organization. The rule is one of judicial administration. It applies not only to suits involving the internal affairs of all forms of voluntary association, but also to actions upon ordinary contracts, including collective bargaining agreements." Cox, *supra,* 58 Mich. L. Rev. at 839 (footnotes omitted). This judicial doctrine is the analogue to the exhaustion doctrine developed in connection

to the Board places coercive attempts to regulate that access beyond the lawful interest of a labor organization.

Contrary to the view of the court below, a union rule requiring the exhaustion of internal union procedures before resorting to the Board would impede "the normal and proper administration of the Act" (R. 38).[22]

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with review of the action of administrative agencies. It rests upon the policies that: "union appellate tribunals may take corrective action, thus reducing the burden on the courts"; "the benefit of the expert judgment of these tribunals might aid courts in making more responsible decisions"; the autonomy of unions is strengthened by giving "the union full responsibility and opportunity to correct its own mistakes." Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 Yale L.J. 175, 207 (1960). Unlike the union rule on exhaustion, which has a deterrent effect on a member's resort to a court, the judicial doctrine merely permits the court, after the member has freely resorted to it, to make a judgment as to whether the issue presented might adequately be resolved under the union's own procedures; and, if so, to remit the member to those procedures. If, on the other hand, the court concludes that exhaustion of internal union procedures would be futile, or that those procedures would be inadequate, the judicial doctrine leaves it free to entertain the member's suit forthwith. The courts have created many exceptions to the exhaustion rule, and "by applying the exceptions [they] have sapped the rule of almost all vitality except in random cases." Summers, *op. cit.*, 70 Yale L.J. at 210, and 207–210. See, also, Wollett and Aaron, *Labor Relations and the Law* (Little Brown, 1960), pp. 74–77; Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1086–1092 (1951).

[22] The court recognized that, had the union rule flatly barred the filing of charges with the Board, union discipline to enforce it would constitute restraint and coercion prohibited by Section 8(b)(1)(A) (R. 38). See, also, *Philadelphia Moving Picture Machine Operators Union, Local 307* v. *National Labor Relations Board*, 382 F. 2d 598, 600 (C.A. 3). It concluded that a different conclusion was warranted where the rule merely re-

"The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights * * *. The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce * * *." *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 362. Thus, although the individual's charge triggers the unfair labor practice proceeding, the scope of the proceeding is not limited to the violations there alleged; the complaint may encompass numerous related unfair labor practices discovered in the course of investigating the charge.[23] Once properly invoked, the Board's power to adjudicate and remedy unfair labor practices may not be restricted by the private agreement of the parties.[24] Moreover, the Board has broad authority to formulate such remedies as will effectuate the policies of the Act.[25]

Accordingly, even if a union member who believes the union has committed an unfair labor practice

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quired that union procedures be exhausted, since such a rule gives the union "a fair opportunity to correct its own wrong before the injured member [has] recourse to the Board."

[23] *National Labor Relations Board* v. *Fant Milling Co.*, 360 U.S. 301, 306–309; cf. *Wirtz* v. *Local No. 125, Laborers' International Union, supra.*

[24] See *Lodge 743, IAM and National Labor Relations Board* v. *United Aircraft Corp.*, 337 F. 2d 5, 8–11 (C.A. 2), certiorari denied, 380 U.S. 908; *International Union of Electrical Workers, Local 613* v. *National Labor Relations Board*, 328 F. 2d 723, 727 (C.A. 3); *National Labor Relations Board* v. *Threads, Inc.*, 308 F. 2d 1, 8 (C.A. 4); *National Labor Relations Board* v. *Local 450 Int'l Union of Operating Engineers*, 275 F. 2d 413, 418 (C.A. 5).

[25] See *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 188.

pursues all intra-union procedures, and even if he achieves some response that is personally satisfactory, this would leave the objectives of the National Labor Relations Act only partially fulfilled. The rights of other employees in the unit who might be the victims of the same union policies now or in the future would be left unprotected; nor is there any guarantee that the individual's conception of an adequate remedy for the deprivation of his statutory rights will coincide with those of the Board, which is charged by Congress with administering the Act in the public interest.

Moreover, an individual union member's charge against his union is often coupled with a corresponding charge of job discrimination against the employer—as was Holder's here (R. 27–28). In a Board proceeding on such charges, both the employer and the union may be made parties, and in this posture the questions of the motives of both can be resolved in a single proceeding; comprehensive and coordinated remedies may then be imposed—including reinstatement to full job rights, backpay for all wages lost, a cease-and-desist order against repetition of the unfair labor practices by either party, and the posting of appropriate notices. Obviously, these issues cannot be fully explored, nor can such effective remedies be provided, in an internal union proceeding to which the employer is not a party.

In short, a requirement that the individual union member exhaust internal union procedures is not likely to be conducive to attainment of the aims of the National Labor Relations Act or to resolution of the problems in a manner which comports with the policies

of the Act.[26] Indeed, to require such exhaustion involves a grave danger that the individual member may never get to the Board at all.[27]

There can be no justification for requiring a union member to exhaust inadequate internal procedures while public processes wait—perhaps never to be invoked if the member simply tires and gives up in the course of pursuing his intra-union remedies.

Nor are these undesirable consequences averted by suggesting, as did the court below, that the member's right to file charges with the Board would only be postponed until after a "practical and reasonable" resort to internal remedies, and that "[o]f course, a court or an administrative agency will determine for itself whether the alleged intra-union remedy is in fact available and whether resort to it would impose unreasonable delay or hardship upon the complainant"

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[26] Where, as here, the member charges a union officer with causing the employer to discriminate against him because of his role in an intra-union conflict, the possibility of securing an impartial hearing or any remedy within the union is particularly remote. See Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1087–1088 (1951); Vorenberg, *Exhaustion of Intraunion Remedies as a Condition Precedent to Appeal to the Courts*, 2 Lab. L. J. 487, 494 (1951). Cf. *Calagaz* v. *Calhoon*, 309 F. 2d 248, 259–260 (C.A. 5).

[27] As Professor Summers pointed out:

> * * * the protracted process of appealing through a hierarchy of officials, ending with the union convention, may take years. Dissenters will have been silenced, opposition groups disintegrated, corruptly elected officials entrenched in power, and union treasuries plundered * * *.

Summers, *The Usefulness of Law in Achieving Union Democracy*, 48 Amer. Econ. Rev. 44, 47 (May 1958).

(R. 38). This approach assumes that, where exhaustion of intra-union remedies would impose unreasonable delay or hardship, the member may, notwithstanding the union exhaustion rule, resort to the Board or the court immediately and any union discipline for violating the rule will be set aside as invalid. The flaw in this formulation is that it compels the member to guess whether the court or the Board would in fact find that his case falls in the exceptional category; and, should he guess wrong, the union's discipline against him for failing to exhaust internal union procedures would stand. In the Board's judgment, the existence of this risk is calculated to chill the exercise of a member's right to an immediate Board remedy, and induce him instead either to forgo his grievance or pursue a futile union procedure. Cf. *Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 239. As the Seventh Circuit stated in *Ryan* v. *Int'l Bro. of Electrical Workers,* 361 F. 2d 942, 946, certiorari denied, 385 U.S. 935: "The right of free access to our courts is too precious a right to be curbed by the risky prediction that the judge's discretion may, like a lucky role of dice, turn up in favor of the suitor." [28]

For these reasons, the Board properly concluded that a unon rule which requires a member to exhaust inter-

[28] In *Ryan*, union members who had been expelled for filing suit against the union without first exhausting internal union remedies brought an action in the district court, pursuant to Section 102 of the Labor-Management Reporting and Disclosure Act (29 U.S.C. 412), to nullify their expulsion on the ground that the union's exhaustion requirement was contrary to Section 101(a)(4) of that Act (discussed, *infra*, pp. 28–37). The Seventh Circuit agreed that the expulsion was invalid.

nal union remedies before filing charges with the Board is contrary to the policies of the Act and hence does not fall within the area of internal union affairs which Congress intended to exclude from the reach of Section 8(b)(1)(A). As Judge Fahy, writing for the District of Columbia Circuit, explained, in sustaining the Board's position: "by filing a charge * * * [the union member] stepped beyond the internal affairs of the Union and into the public domain. The Act, in enabling the Board to inhibit the Union from penalizing him for doing so keeps open the channels created by Congress for the administration of a public law and policy." *Roberts* v. *National Labor Relation Board,* 350 F. 2d 427, 429.[29]

[29] The question whether a union rule or policy is within or without the area of legitimate union concern, although relatively easy to answer in the situation presented in *Allis-Chalmers*, *supra*, and in the situation here, becomes more difficult in other situations. Thus, in *United Steel Workers of America* (*Richard C. Price*), 154 NLRB 692, and *Tawas Tube Products, Inc.*, 151 NLRB 46, the Board held that a union does not violate Section 8(b)(1)(A) by disciplining a member for filing with the Board a petition to decertify his union as bargaining representative, under Section 9(c)(1)(A)(ii) of the Act. In *Cannery Workers Union* (*Van Camp Sea Food Co.*), 159 NLRB 843, 849–850, the Board has recently given a full explanation of why it regards these cases as materially different from *Skura*-type cases like the present one. Currently pending before the Court in No. 399, *Price* v. *National Labor Relations Board*, is a petition for a writ of certiorari to review the decision of the Ninth Circuit, 373 F. 2d 443, sustaining the Board's analysis distinguishing the lawfulness of union discipline in these two types of situations. It is unnecessary, however, for the Court in deciding the instant case to consider the merits of the Board's approach to the question presented in *Price*. See *Federal Trade Commission* v. *Borden Co.*, 383 U.S. 637, 647.

C. SECTION 101(a)(4) OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT DOES NOT AUTHORIZE UNION DISCIPLINE OF A MEMBER FOR FILING CHARGES WITH THE BOARD WITHOUT EXHAUSTING INTERNAL UNION PROCEDURES

The court below found that Section 101(a)(4) of Title I of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 411(a)(4)) ("LMRDA") "makes it mandatory" (R. 39) that the Board conclude that labor organizations are privileged to expel members for filing charges with the Board without exhausting internal union procedures. We submit that the court's reliance on this provision is misplaced. This section was not designed to confer any authority or immunity on labor unions, and its proviso is addressed not to unions but to courts and administrative agencies.

Section 101(a)(4) is part of the "Bill of Rights of Members of Labor Organizations" and is entitled "Protection of the Right to Sue." It provides:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency * * * or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings * * *.

The location of this provision in Title I of the LMRDA, rather than in Title VII which contains the

amendments to the National Labor Relations Act, immediately suggests that this provision was not intended to have any effect on the rights and remedies created under the latter statute and certainly not to constrict a union member's protections thereunder. This assumption is confirmed by Section 103 of Title I ("Bill of Rights") of the LMRDA (29 U.S.C. 413), which provides that "[n]othing contained in this [title] shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal * * *."[30]

Moreover, the language of the opening portion of Section 101(a)(4)—"No labor organization shall limit the right of any member thereof to institute an action in any court, or in any proceeding before any administrative agency"—demonstrates that the main thrust of the section is to prohibit, as a matter of federal law, those limitations by unions which the courts had generally regarded as contrary to public policy (see pp. 20–21, *supra*). Viewed in this light, the exhaustion proviso was not intended, as the court below held it was, to sanction union discipline of a member who has not exhausted internal union procedures for at least four months. Rather, the proviso is concerned with fixing the outer limits on the traditionally recognized doctrine of exhaustion of remedies applied by

[30] See *Grand Lodge of Int'l Assoc. of Machinists* v. *King*, 335 F. 2d 340, 347 (C.A. 9), certiorari denied, 379 U.S. 920; cf. *Figueroa* v. *Nat'l Maritime Union*, 342 F. 2d 400, 405 (C.A. 2). See also Section 603(b) of Title VI of the LMRDA (29 U.S.C. 523), which provides that nothing in the earlier titles shall be construed "to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended."

courts and other agencies (see n. 21, *supra*); that is, the proviso advises public tribunals that *they* may in their discretion continue to stay their hands when they consider it appropriate, subject to the newly added caveat: "but not to exceed" four months. "The proviso does authorize, indeed it may require, the agency or court to which the member comes for relief to withhold the exercise of its authority—for four months if reasonable internal procedures are available and are not earlier exhausted—in deference to the congressional desire that a solution be reached by means other than at the hands of public authorities. Approval of such restraint by agency or court is quite different, however, from freeing the Union itself to impose a fine for failure of a member to exhaust such procedures." *Roberts* v. *National Labor Relations Board,* 350 F. 2d 427, 430 (C.A. D.C.). Accord: *Detroy* v. *American Guild of Variety Artists,* 286 F. 2d 75, 78 (C.A. 2), certiorari denied, 366 U.S. 929; *Ryan* v. *Int'l Bro. of Electrical Workers,* 361 F. 2d 942, 946 (C.A. 7), certiorari denied, 385 U.S. 935.[31]

An understanding of the legislative history of Section 101(a)(4) and its proviso demonstrates the soundness of this interpretation, and authoritative comment confirms it. The bill that was originally passed by the Senate set forth the protection of the

[31] See, also, *Calhoon* v. *Harvey,* 379 U.S. 134, 144–145 (concurring opinion); *Simmons* v. *Avisco, Local 713, Textile Workers Union,* 350 F. 2d 1012, 1016, n. 4 (C.A. 4); *Burris* v. *Int'l Bro. of Teamsters,* 224 F. Supp. 277, 280 (W.D. N.C.); *Deluhery* v. *Marine Cooks & Stewards,* 199 F. Supp. 270, 274 (S.D. Cal.). Contra: *Sheridan* v. *United Bro. of Carpenters, Local 626,* 306 F. 2d 152, 160 (C.A. 3, concurring opinion of Hastie, J.).

right to sue in language substantially similar to that in the present law but provided that a union member "may be required" to exhaust internal remedies, "but not to exceed a six-month lapse of time". Section 101 (a)(4), S. 1555, 86th Cong., 1st Sess., 1 *Leg. Hist. LMRDA 1959,* p. 520. The House Labor Committee, however, reported out a proposal taking a somewhat different approach on this question. See H. Rep. No. 741, 86th Cong., 1st Sess. 7, 30, 1 *Leg. Hist. LMRDA, 1959,* pp. 765, 768. This bill, H.R. 8342, contained a proviso declaring that a union member "shall be required to exhaust the reasonable remedies available" within his union, without specifying any time limit on the required exhaustion. See 1 *Leg. Hist. LMRDA, 1959,* p. 698. Shortly thereafter, Representatives Landrum and Griffin introduced their substitute for the Committee bill, cast in the language which was ultimately adopted by both Houses, providing that the union member "may be required" to exhaust reasonable intraunion remedies for up to four months.

For our purposes, of course, the decisive inquiry is what significance should be attributed to the existence of the proviso, to the use of the verb "may" be required, and to the choice of a four-month limit. Although in the debates on these questions some legislators were occasionally unclear or imprecise in analyzing the purposes and effects of this section, reading the various statements in the context of the overriding objective of securing and protecting the union member's right of recourse against his union demonstrates that the court below was mistaken in treating this proviso as dispositive.

We submit that insofar as there was a congressional consensus on the question of the applicability of the proviso, it was intended not to sanction mandatory exhaustion restrictions in union constitutions but to validate, with some limitation, the judicial doctrine of exhaustion. During the debate on the respective merits of the Committee bill and the Landrum-Griffin substitute, Representative (now Speaker) McCormack spoke out in favor of the unlimited formulation in the Committee bill, explaining (105 Cong. Rec. 15835, 2 *Leg. Hist. LMRDA, 1959,* pp. 1666–1667):

> * * * the committee concluded that to leave the problem in the hands of the courts where it presently resides was entirely reasonable. The doctrine of exhausting internal remedies has been uniformly accepted by the courts of this country, both State and Federal, over a period of many years, and has been required by some courts even in the absence of such provision in union constitutions making it a prerequisite to court action.[32]

He carefully defined the objective of the Committee's decision to omit a time limit on exhaustion in terms that demonstrate that the focus was the activity of the courts and not of the unions (*ibid.*):

> * * * The absence of a time limitation for exhausting internal union procedures in the committee bill is simply a restatement of existing applicable State and Federal law which no one, to our knowledge, has attacked as in any way unfair or inequitable.

Congressman O'Hara, also arguing in favor of the

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[32] *Accord*, 105 Cong. Rec. 15536, 2 *Leg. His. LMRDA, 1959*, p. 1572 (remarks of Rep. Thompson).

Committee approach, explained that its bill merely "restate[d] the common law doctrine that a member before bringing suit should exhaust such available remedies * * * as are reasonable under the particular circumstances of his case." He then suggested that the Landrum-Griffin proposal for a four-month limit would be unnecessary since the courts in either case "will continue to apply their own independent judgment on this matter" (105 Cong. Rec. 15689–15690, 2 *Leg. Hist. LMRDA, 1959,* p. 1632).

Also supporting the Committee bill, Congressman Foley explained that the principal difference between the two measures was that the Committee proviso would have been mandatory while the Landrum-Griffin formulation "is discretionary since it does not require the exhaustion of internal remedies before suit is instituted * * *"; his objection to this treatment was that it was incompatible with the judicial doctrine that such an action "is not ripe for judicial decision" until the union's grievance machinery has been utilized. (105 Cong. Rec. 15563, 2 *Leg. Hist. LMRDA, 1959,* p. 1600).

This analysis accurately reflects the pervasive congressional design to insure that the right to resort to public tribunals be relatively unfettered. The determination to accept the Landrum-Griffin substitute despite the illumination of the two important respects in which it differed from the Committee bill coincides with this predominant concern for the rights of the union member rather than for the interests of the organization. The Congress adopted a proviso that left room for *judicial* discretion on whether to remit the

member to available union remedies, without intending to codify what might or might not have been a general rule to *require* exhaustion.[33] Then, underscor-

[33] An argument might be made that the use of the verb "may" was, on the contrary, understood to authorize labor unions to insist that their members exhaust internal procedures and to require that the courts (and the Board) respect this requirement. Such a suggestion would cite the fears, expressed by certain legislators, that the equivalent provision of S. 1555, which had passed the Senate with a six-month exhaustion requirement, might foreclose union members from filing charges with the Board, because of the six-month limit imposed by Section 10(b) of the NLRA. See 105 Cong. Rec. 10095 (Sen. Goldwater), 14344–14345 (Reps. Landrum and Griffin), 15530 (Rep. Griffin); 2 *Leg. Hist. LMRDA, 1959*, pp. 1280, 1520, 1566–1567. Because Section 101(a)(4) of the Landrum-Griffin Bill reduced the exhaustion provision from six to four months, it may be argued that, unless Congress intended to permit unions to impose discipline on their members for filing unfair labor practice charges without exhausting internal union procedures, no such accommodation of the statutory time periods would have been necessary. A more likely explanation is that some legislators erroneously supposed that there was an exhaustion requirement in Board proceedings, and others, who knew better, nonetheless sought to eliminate any appearance or possibility of conflict between the two statutory periods. See Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 870 (1960) (concluding that Congress was attempting to resolve an "illusory problem"); Hickey, *The Bill of Rights of Union Members*, 48 Geo. L.J. 226, 248–249 (1959). Moreover, it is important to note that the union members' "Bill of Rights," as it was eventually enacted, represented a hastily drafted compromise between those who desired to encourage democratic self-government within labor organizations by leaving the courts wide latitude to require exhaustion of internal union remedies, and those who were not sympathetic to that doctrine and therefore hoped to see it restricted as much as possible. Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 839–841 (1960). To those who were hostile to the doctrine, any reduction in the exhaustion period would have seemed desirable.

ing this objective, Congress fixed a four-month limit on the authority of the courts to apply such a rule of judicial restraint because important public interests are at stake in the prompt adjudication of a union member's complaint that his labor organization is acting unlawfully.

The definitive explanations of the legislators who played the preeminent part in shaping this legislation reinforce this appraisal. Thus, Representative Griffin, in making the final summary of his bill before the House overwhelmingly endorsed the conference decision to adopt his approach, recapitulated (105 Cong. Rec. 18152, *Leg. Hist. LMRDA, 1959,* p. 1811):

> Section 101(a)(4) * * * is designed to protect the right of a union member to resort to courts and administrative agencies. The proviso which limits exhaustion of internal remedies is not intended to impose restrictions on a union member which do not otherwise exist, but rather to place a maximum on the length of time which may be required to exhaust such remedies. In other words, existing decisions which require, or do not require, exhaustion of such remedies are not to be affected except as a time limit of four months is super-imposed. Also, by use of the phrase "reasonable hearing procedures" in the proviso, it should be clear that no obligation is imposed to exhaust procedures where it would obviously be futile or would place an undue burden on the union member.

Representative Griffin then added pointedly (*ibid.*):

> Furthermore, the proviso was not intended to limit in any way the right of a union member under the Labor-Management Relations Act of

1947, as amended, to file unfair labor practice charges against a union, or the right of the NLRB to entertain such charges, even though a 4-month period may not have elapsed.

In reporting back to the Senate on the results of the conference, Senator John F. Kennedy conveyed a similar theme (105 Cong. Rec. 17899; 2 *Leg. Hist. LMRDA, 1959,* p. 1432): "The basic intent and purpose of the provision was to insure the right of a union member to resort to the courts, administrative agencies, and legislatures without interference or frustration of that right by a labor organization."[34] He added: "So long as the union member is not prevented

[34] In the course of the same remarks, Senator Kennedy did observe that: "On the other hand, it was not, and is not, the purpose of the law to eliminate existing grievance procedures established by union constitutions for redress of alleged violation of their internal governing laws. Nor is it the intent or purpose of the provision to invalidate the considerable body of State and Federal court decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to court intervention depending upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case."

This explanation is reconcilable with the immediately preceding point, quoted in the text, that the basic purpose of the Section is to insure the right of union members to resort to courts "without interference or frustration of that right by a labor organization." It merely underscores the point that the courts may continue to abstain from intra-union disputes—for up to four months—while they insist that the member resort to existing union grievance machinery.

He then also remarked, rather cryptically, that "the 4-month limitation in the House bill also relates to restrictions imposed by unions rather than the rules of judicial administration or the action of Government agencies." It is conceivable that Senator Kennedy was merely suggesting that the proviso is inapplicable to Board proceedings, since he immediately gave as an example

by his union from resorting to the courts, the intent and purpose of the 'right to sue' provision is fulfilled * * *." Finally, of special importance for resolution of the question now before the Court, he stated that the proviso was not intended to prohibit the "National Labor Relations Board * * * from entertaining charges by a member against a labor organization even though 4 months has not elapsed." [35]

Accordingly, contrary to the view of the court below, the Board's holding that the Unions violated Section 8(b)(1)(A) by expelling Holder for filing charges with the Board without first exhausting internal union remedies is in full accord with the purposes and effect of Section 101(a)(4) of the LMRDA; the proviso to that section was not intended to authorize union restrictions on access to the Board that handicap effectuation of the objectives of the National Labor Relations Act.

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of his meaning the ability of the Board to entertain charges before the passage of four months. Or, it might have been a method of obscuring the thrust of the proviso in order to soothe some legislators who disfavored any limitation on the judicial exhaustion requirement. See Cox, *Internal Affairs of Labor Unions under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 839–841 (1960).

[35] The Senate later in the day voted 95–2 to accept the Conference Report. 105 Cong. Rec. 17919–17920, 2 *Leg. Hist. LMRDA, 1959*, p. 1453.

CONCLUSION

The judgment of the court below setting aside the Board's order should be reversed, and the case remanded with directions to enforce that order.

Respectfully submitted.

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MARCH 1968.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > * * * * *
> >
> > (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;
> >
> > * * * * *
>
> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> > (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with

respect to the acquisition or retention of membership therein; * * *

* * * * *

Sec. 9. * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

The relevant provisions of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. 401, *et seq.*) are as follows:

Title I—Bill of Rights of Members of Labor Organizations

Sec. 101(a) * * *

(4) *Protection of the Right To Sue.*—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * *.

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Sec. 103. Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

U.S. GOVERNMENT PRINTING OFFICE: 1959